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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 45

FEDERAL POWER COMMISSION, *Petitioner*,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., THE CITY OF NEW YORK,

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

~~MOTION FOR LEAVE TO FILE BRIEF AND~~ BRIEF ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AMICI CURIAE

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MOTION ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA FOR LEAVE TO FILE BRIEF AMICI CURIAE

The People of the State of California and the Public Utilities Commission of the State of California (hereinafter called California) through its Attorney and Chief Counsel, move for leave to file the attached brief *amici curiae* in support of the order of the Federal Power Commission vacated by the decision of the Court below. The *amici* participated in support of the

Commission's order as *amici curiae* in the Court below and before this Court on the petition for writ of certiorari.[1] The consent of Petitioner Federal Power Commission and Respondent Consolidated Edison Company were granted. Consents of other respondents were not granted.

California is vitally concerned with this cause. California gas distributing utilities serve a population in excess of 15 million people throughtout the state. Approximately three-quarters of the natural gas utilized in California comes from out-of-state sources. Presently the major out-of-state supplier of natural gas to California is the El Paso Natural Gas Company, which is subject to the jurisdiction of the Federal Power Commission. California gas utilities presently purchase over 2,000,000,000 cubic feet of natural gas daily for the California market—requiring an outlay of over $600,000 a day for such gas, or over $200,000,000 a year (and sustaining an investment by El Paso of over $1,500,000,000). Such imports of interstate natural gas constitute over 10% of all the natural gas moving in interstate commerce throughout the United States—and exceed the volume of gas imported by any

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[1] The undersigned Attorney and Chief Counsel for the Public Utilities Commission of the State of California is charged with the duty and responsibility of representing and appearing for the People of the State of California and the Public Utilities Commission of said State in all matters concerned with public utility regulation (Section 307, California Public Utilities Code, formerly Section 4 of the Public Utilities Act). The Public Utilities Commission exercises exclusive jurisdiction over all public utility regulatory matters, including the regulation of rates and service of gas utilities furnishing either natural or manufactured gas to consumers of California.

other state.[2] The interest of California in an adequate supply of natural gas at a just and reasonable price has been the subject of administrative litigation by the *amici* over many years before the Federal Power Commission. California's problems are real, not academic.

Since the decision below if permitted to stand will severely restrict the Federal Power Commission's ability to protect California gas consumers and consumers elsewhere, California has a vital stake in the proceeding. The *amici* believe and represent that they can make a contribution to this Court's consideration of the issues here which are of national importance not restricted to any one gas distribution area of the country.

For these reasons, California requests leave to file the attached brief *Amici Curiae*.

Respectfully submitted,

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[2] Bureau of Mines Yearbook, 1958, Natural Gas, Table 9.

TABLE OF CONTENTS

	Page
CALIFORNIA'S POSITION	6
THE INTEREST OF THE STATE OF CALIFORNIA	7
ARGUMENT	7
A. The Gap in Regulation Created by the Decision Below Could Have an Immediate, Crippling Effect on the Commission's Regulation of the Gas Industry	7
B. The Decision Below Could Have a Severe Impact on the Industry's Market Structure Which Has Been Shaped by a Pattern of Twenty Years of Commission Regulation	10
CONCLUSION	14

TABLE OF CITATIONS

COURT DECISIONS:

Atlantic Refining Co. et al. v. *Public Service Commission of the State of New York*, 360 U.S. 378	6
FPC v. *Hope Gas Company*, 320 U.S. 591	12
Panhandle Eastern Pipe Line Company v. *Public Service Commission of Indiana*, 332 U.S. 507	10
Phillips Petroleum Co., et al. v. *State of Wisconsin, et al.*, 347 U.S. 672	6

FEDERAL POWER COMMISSION DECISIONS:

Transwestern Pipeline Company, Opinion No. 328, issued August 10, 1959	9

STATUTES:

California Public Utilities Code, Section 307 (formerly Section 4, Public Utilities Act)	2
Natural Gas Act, 52 Stat. 821, as amended 1938, 15 U.S.C. Secs. 717-717w	8

MISCELLANEOUS:

Bureau of Mines, Minerals Yearbook, Natural Gas, 1950	8
Bureau of Mines, Minerals Yearbook, Natural Gas, 1958	3
Consumer Price Index, November, 1959	8
Federal Power Commission Report, 1957-1958	9

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BRIEF AMICI CURIAE ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The People of the State of California and the Public Utilities Commission of the State of California (hereinafter called California), through its Attorney and Chief Counsel, urge that the decision of the Court of Appeals below be reversed and vacated.

CALIFORNIA'S POSITION

The instant decision, if allowed to stand, will have a harmful effect upon effective control by the Federal Power Commission of rates. Secondly, and of equal importance, the instant decision deprives the federal agency of all discretion to withhold a certificate in those cases where, despite demonstrated harmful economic and social consequences, certain minimal standards are met.

California, because of its dependence upon natural gas and its interest in a continuing supply thereof at just and reasonable prices, believes that this decision should not be permitted to upset the balance which has been established in this regulatory field between the firm user of gas and the interruptible user of gas. By removing a measurable segment of gas from the jurisdiction of the Federal Power Commission, the decision of the Court of Appeals creates a gap in regulation, which the states cannot effectively repair. It is apparent that if gas can be sold by producers in one state without control, for distribution in another state without control, the transaction will be free from any effective regulation, and particularly as to price.

The instant decision, if allowed to stand, will nullify the protective decision of this Court in *Phillips Petroleum Company, et al.* v. *State of Wisconsin, et al.*, 347 U.S. 672 (1954) in a large area of this industry. Additionally, the initial price protection which this Court re-affirmed in *Atlantic Refining Company, et al.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959) will also be removed.

It is plain to California that none of these results is in the public interest; they are certainly contrary to the spirit and letter of the Natural Gas Act.

California asks that the relief herein sought be granted and that the decision of the lower court be reversed.

THE INTEREST OF THE STATE OF CALIFORNIA

The interest of the *amici curiae* is set forth in the motion to which this brief is attached.

ARGUMENT

The instant decision compels the Federal Power Commission to issue a certificate authorizing the transportation of natural gas in interstate commerce to an ultimate market even though such gas is purchased on a non-jurisdictional or unregulated basis, whenever "minimal statutory requirements" have been met. These minimum requirements, as the Court construed them, ignore entirely any considerations of economic impact and its effect upon the public interest. The instant decision permits, and indeed invites, the direct sales-transportation arrangement here involved, all of which negates the complete regulatory scheme set forth in the Natural Gas Act. Most importantly, this type of arrangement exempts the producers of gas from any regulation. With price such an important factor in determining public convenience and necessity, it is evident that such a basic exemption as this does not suit the public interest.

A. The Gap in Regulation Created by the Decision Below Could Have An Immediate, Crippling Effect on the Commission's Regulation of the Gas Industry.

This new attempt to avoid Federal Power Commission regulation should be promptly and emphatically disapproved. The transaction involved was apparently tailored to avoid Federal Power Commission price reg-

ulation under the Natural Gas Act (Act of June 21, 1938, c. 556; 52 Stat. 821-833; 15 U.S.C. 717-717w). Its approval by the Court below, reversing the Commission's efforts to carry out its regulatory duties, would create a gap in federal regulation of the gas industry which would effectively emasculate this Court's decisions in *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672 (1954), and *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959).

The decision in this case is especially important because of the difficult regulatory problems which currently face the Federal Power Commission. These problems are both urgent and national in scope.

At the present time, California purchases more than $200,000,000 of gas a year. This gas, all resold in California, is delivered at the California-Arizona border by El Paso Natural Gas Company (a major natural gas transmission pipe line company) at rates subject to the Federal Power Commission's regulatory jurisdiction. Within the past 10 years—since the initiation of service in 1947—the price of this gas, delivered, has doubled, increasing from about 15¢ in 1949 to over 30¢ per Mcf, an unparalleled rise in the postwar cost of any regulated commodity entering so importantly into the cost of living.[1]

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[1] This rise in the city gas price is directly reflected in the cost of gas at the point of consumption. In this same period of time, 1948-1958, the average value of natural gas at points of consumption throughout the United States has risen from 24.1¢ per Mcf to 46.2¢ per Mcf, an increase of over 90% (Bureau of Mines, Minerals Yearbook, Natural Gas, 1950, 1958). By contrast, the Consumer Price Index, widely used as a cost-of-living index, stands at 125.6% (November, 1959), an increase of only 25% over the same 1947-1949 base period.

For the most part, the rise in the price of interstate gas purchased by the California utilities has resulted from the bidding up of gas prices in the Permian Basin and Panhandle Field areas in southwestern Oklahoma, Texas, and New Mexico, where the major portion of El Paso's supplies for the Southern California area are produced.[2]

As a consequence, the California utilities are today paying $75,000,000 more a year for gas than the same volumes of gas cost them as *recently as 1957*. Nationally, the increases amount to several hundred million dollars a year. If the decision below is not reversed, and the Commission's authority to deal with evasions of the type presented here confirmed, the natural gas industry faces continued pricing problems of a major character. Millions of ultimate gas consumers are similarly affected.

As the Commission pointed out, multiple bidding activity by large industrial users of gas would "unnec-

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[2] Even three years ago, in early 1957, this gas sold at prices of 9¢-10¢ per Mcf. Today, typical prices are twice this level, 18¢-20¢ per Mcf. The average price of El Paso's field purchases was 9.5¢-10.2¢ per Mcf in 1957-1958 (FPC Report, Direct Sales by Producers of Natural Gas to Reporting Interstate Natural Gas Pipeline Companies, 1957-1958, Table 7). By contrast, Transwestern Pipeline Company, newly certified by the Federal Power Commission in August, 1959, contracted for new supplies at 18¢-23¢ per Mcf in the same areas (Opinion No. 328, issued August 10, 1959).

Naturally, the picture is the same. In 1948, the average value of gas at the wellhead was 6.5¢ per Mcf. Today (1958), it is 11.9¢ per Mcf, an increase of about 85% (Bureau of Mines, Minerals Yearbook, Natural Gas, 1950, 1958). This increase is even sharper in some major areas, such as Texas, where the field price of gas has more than doubled in this 10-year period (Bureau of Mines, *ibid.*).

essarily increase the price of natural gas" (R. 175). Since such sales would be for direct use and not for resale, they would be exempt from the Commission's rate jurisdiction under the Natural Gas Act. Many producers would hold their gas for direct sale only to such large industrial customers, and the inevitable result would be to drive natural gas field prices—applicable to all gas sales—to even higher levels than exist today.

B. The Decision Below Could Have a Severe Impact on the Industry's Market Structure Which Has Been Shaped by a Pattern of Twenty Years of Commission Regulation.

A basic and long-enduring problem of the natural gas industry is the large demand for gas for space heating in winter months which is not balanced by comparable demands during the balance of the year. If adequate pipeline capacity were built solely to satisfy peak winter demands, it would be idle during much of the year, substantially increasing the cost of transporting and distributing gas. Pipe lines and distributors meet this problem to some extent by gas storage, but primarily by interruptible sales of large volumes of gas to industrial customers during off-peak periods. These sales benefit domestic consumers by spreading capital costs and reducing incremental costs of gas delivered by the system. However, if the decision below stands, straight gas distributors are seriously threatened with the loss of such load-balancing interruptible industrial sales. The result will be imposition of unrecovered fixed costs on the millions of ultimate consumers using gas for residential and commercial purposes.

In *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947),

this Court held that direct sales are subject to State rate jurisdiction. In commenting on Panhandle's attempts to avoid this jurisdiction the Court said:

> "**** 'the primary aim of this legislation [the Natural Gas Act] was to protect consumers against exploitation at the hands of natural gas companies.' The scheme was one of cooperative action between federal and states agencies. It could accomplish neither that protective aim nor the comprehensive and effective dual regulation Congress had in mind, *if those companies could divert at will all or the cream of their business to unregulated industrial uses.* 19" (pp. 520-521; emphasis supplied.)
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> * * *
>
> "[19]Over 38 percent of the gross revenues of the local Indiana utilities from the sale of gas is derived from service to the approximately 250 industrial consumers served by them. If service to any substantial number of the industrial users were to be taken over by appellant, the local utilities not only would suffer great losses in revenue, but would be unable to dispense with more than a trivial percentage of their plant properties. The resultant increase in unit cost of gas would lead necessarily to increased rates for the consumers served by the local companies." (fn. 19, p. 521)

The Court of Appeals in the instant case adopted a restrictive and improper interpretation of the concept of public convenience and necessity which would make it impossible for the Commission to give *any* consideration to injury to existing consumers. The Court of Appeals commented in its decision that the phrase "public convenience and necessity," as set forth in Section 7 of the Natural Gas Act, was one vague in meaning, subject to any construction. While recognizing that the phrase has taken on a certain meaning throughout

the years because of the administrative interpretation placed upon it, the court erroneously stated that its meaning is that which one cares to put into it. Such is not the case. We must presume that all of the language in Section 7, and particularly this phrase, was utilized after due deliberation and consideration by the Congress. Furthermore, that which suits the public convenience and necessity must be read in the context of the entire purpose of the Natural Gas Act. The basis of federal regulation in the first instance was that the business of transporting and selling natural gas was "affected with public interest". This Court in *Federal Power Commission* v. *Hope Gas Company*, 320 U.S. 591, 612, pointed out that, among its other purposes, the Act was designed to prevent exploitation of the consumer. It is not correct then, as the instant decision has done, to read the Act in such a manner as to recognize its protective qualities but, in the next breath, to authorize a scheme which effectively defeats total, meaningful regulation.

California points out to the Court that within the phrase "public convenience and necessity" the federal agency is authorized, and indeed bound, to take into consideration, in acting upon a certificate application, all factors which have a bearing thereon, including the impact on existing jurisdictional sources of gas. This Court should note the authority given the Commission by Section 7 (f) of the Natural Gas Act, wherein the Commission is authorized to determine a service area of an applicant. Does the law contemplate extended investigation and hearings authorizing a service area and all of the supporting industry and facilities behind it, if in a situation such as here a competing service area *must* be allowed

whether existing facilities are adequate or inadequate? Does not the Commission have some discretion and duty to measure economic impact and public interest occasioned by competing applicants? We submit that the Natural Gas Act gives to the Commission such power.

In Section 7 (e) of the Natural Gas Act, the Commission is given authority to grant a certificate only where the proposed service "is or will be required by the present or future public convenience and necessity; otherwise, such application shall be denied." Obviously, that which will exist in the future is different from that which exists in the present. The Congress did not utilize this language without some congressional meaning. We submit that the very situation which is now before the Court must be measured in terms of present economic impact *and* in terms of future consequences, and as those consequences will affect the future public convenience and necessity.

The alternative in the event the instant decision stands is harmful, ineffective regulation. It is an invitation to producers, who have thus far shown a reluctance toward federal regulation of gas prices, to step over the line to the unregulated area of gas sales. That this will occur is inevitable, if only because of the understandable desire of any business to exact all that the market can bear.

If the instant decision stands, pipeline corporations, to survive, will be forced into competition for gas supply at the field level with direct industrial users and bidders. The mechanics of regulation and the administrative delay inherent therein will undoubtedly be the very factors which will cause producers of large gas reserves to deal on a direct basis with pipeline

companies, as here. In the latter situation prices can be fixed between the parties, absent all administrative control. The only limitation upon price and return will be the pocketbook of the buyer.

CONCLUSION

In order to preserve a total scheme of regulation, as well as an effective pattern thereof, the decision of the Court of Appeals below should be reversed.

Respectfully submitted,

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September 20, 1960

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion and Brief *Amici Curiae* on the following parties by mailing a copy thereof properly addressed with postage prepaid to:

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Dated at San Francisco, California, this 20th day of September, 1960.

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